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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DONALD JOSEPH MACKENZIE, Defendant and Appellant.	B282720 (Los Angeles County Super. Ct. No. YA089418)

APPEAL from a judgment of the Superior Court of Los Angeles County. Alan B. Honeycutt, Judge. Conditionally reversed and remanded with directions.

Patricia S. Lai, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb, David E. Madeo, Zee Rodriguez, and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

In an amended information, the Los Angeles County District Attorney's Office charged defendant and appellant Donald Joseph MacKenzie with arson of an inhabited structure or property (Pen. Code, § 451, subd. (b); count 2),[1] two counts of vandalism with damage over $400 (§ 594, subd. (a); counts 3 & 4), and arson of the property of another (§ 451, subd. (d); count 5). The amended information further alleged that defendant suffered three prior convictions within the meaning of the "Three Strikes" Law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), suffered three prior serious felony convictions (§ 667, subd. (a)(1)), and served two prior prison terms (§ 667.5, subd. (b)).

Defendant pleaded no contest to counts 3 and 4 and admitted the truth of the prior conviction and prior prison term allegations as to those counts. Trial on counts 2 and 5 was by jury. The trial court granted defendant's motion for acquittal on count 2, pursuant to section 1118. The jury found defendant guilty of count 5. Defendant admitted the truth of the prior conviction and prior prison term allegations.

The trial court struck two of defendant's prior strike convictions pursuant to section 1385, and sentenced defendant to a term of 13 years eight months in prison, including five years pursuant to section 667, subdivision (a)(1). He was awarded 2,320 days of presentence custody credit.

Defendant timely filed a notice of appeal. In his opening brief, defendant contends that his conviction on count 5 must be reversed because the trial court erred by admitting evidence of: (1) a prior uncharged arson to prove identity pursuant to Evidence Code section 1101, subdivision (b); and (2) an

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

unauthenticated photograph that was obtained from defendant's Facebook page. Defendant also argues his presentence custody credits were incorrectly calculated.

In a supplemental brief filed September 24, 2018, defendant argues that we should remand the matter to allow the trial court to conduct a pretrial diversion hearing pursuant to newly enacted section 1001.36. In a second supplemental brief, filed October 25, 2018, defendant argues that we should remand the matter to allow the trial court to exercise its discretion to strike the five-year enhancement imposed pursuant to section 667, subdivision (a)(1). (Sen. Bill No. 1393 (2017-2018 Reg. Sess.) (SB 1393).)

We conclude that the trial court did not err in admitting evidence of a prior uncharged arson and of the photograph obtained from defendant's Facebook page. But, we conclude that newly enacted section 1001.36 and the recent amendment to section 667, subdivision (a), apply to this case. Accordingly, we conditionally reverse the judgment to allow the trial court to determine whether defendant qualifies for diversion and then proceed according to the procedures set forth in section 1001.36. If defendant's judgment of conviction stands, then the trial court must exercise its discretion under amended section 667, subdivision (a), to determine whether to dismiss the punishment for the prior serious felony conviction. Lastly, the judgment must be modified to correctly reflect defendant's presentence custody credits.

BACKGROUND

The People's Evidence

A. The January 2, 2014 Arson Offense

At around 7:00 p.m., Antoun Safar (Safar), the owner of a liquor store, was working behind the counter when defendant pushed a shopping cart through the open front door of the store

into a display of wine bottles. A customer pointed towards defendant, who was walking away from the store. Safar ran outside and yelled at defendant. Defendant laughed at Safar and began running up Trudie Drive. Defendant jumped on top of an electrical box; then he jumped on top of a car. Defendant was acting "weird."

Safar returned to his store, got his car keys and his phone, and went to follow defendant in his vehicle. Safar called 911 and reported the incident. He then drove up Trudie Drive and turned right onto Jaybrook Drive.

Moments later, Safar saw defendant crouching on the porch of a house located on Jaybrook Drive. Defendant had removed a flag from a pole in front of the residence and lit it on fire approximately one foot from the home's wooden front door. Safar made a U-turn and drove back towards the house, when defendant suddenly ran across the street in front of his vehicle. Safar got out of his vehicle and kicked the burning flag away from the door of the residence. The flames were approximately 18 inches high and 18 to 24 inches wide. Safar stomped out the fire. The fire left ashes and stained the concrete area in front of the porch. The owners emerged from their residence and Safar went to look for defendant, but he could not locate him.

Safar identified defendant at trial, and prior to trial from a photographic array, as the man who had pushed a cart into his store and subsequently set a fire on Jaybrook Drive.

On January 22, 2014, Los Angeles County Sheriff's Department Detective James Dondis went to defendant's residence, located on Trudie Drive, close to the residence on Jaybrook Drive. As Detective Dondis entered the residence, defendant stated that he had thrown his cell phone into the toilet. Detective Dondis retrieved the phone and attempted to

dry it out. The Sheriff's Department was unable to extract any information from the cell phone.

Detective Dondis arrested defendant.

B. Prior Uncharged Arson Offense—December 30, 2013[2]

Houston Brignano (Brignano) was in the backyard of his residence on North Parker Street in San Pedro when he looked over his wall and saw that the Christmas tree he had just thrown away in the alley was on fire. Defendant was standing in the alley facing the tree and he was recording the burning tree with his cell phone. Brignano asked defendant what he was doing. Defendant did not respond. Brignano photographed defendant and his vehicle, including the vehicle's license place number. Defendant got into the vehicle and drove away. Brignano called 911.

The fire spread quickly and engulfed the entire tree. Brignano extinguished the fire himself. When the fire department arrived, Brignano told firefighters what had occurred and showed them the pictures he had taken. Arson investigators ran the license plate number and determined that it was registered to Socooro MacKenzie at defendant's address on Trudie Drive.

C. Facebook Photographs

Detective Dondis located a Facebook profile belonging to defendant. The profile was in the name of "Joe Mack III." Defendant's middle name is Joseph. The Facebook page contained a photograph, located in the "mobile uploads" section of the page, depicting Brignano's burning Christmas tree.

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[2] The uncharged offense was admitted into evidence for the limited purpose of establishing defendant's identity as the person who committed the charged offense.

Defendant's Evidence

Defendant called one expert, who offered evidence regarding memory and eyewitness identification.

DISCUSSION

I. The trial court did not abuse its discretion when it admitted evidence, for the limited purpose of proving identity, that defendant burned Brignano's Christmas tree three days prior to the instant offense

A. *Relevant proceedings*

Prior to trial, the People filed a motion to admit evidence of uncharged acts pursuant to Evidence Code section 1101, subdivision (b). Specifically, the People sought the admission of defendant's act of burning Brignano's Christmas tree, as well as admission of a third act of arson involving a different Christmas tree. Defendant opposed the People's motion.

After entertaining oral argument, the trial court determined that it would admit evidence of the incident involving Brignano's Christmas tree in order to prove identity under Evidence Code section 1101, subdivision (b), but that it would exclude evidence of the incident involving another Christmas tree. The trial court explained that defendant lived in the area where the charged offense occurred, and that he lived close to Brignano's residence as well. The offenses occurred within three days of one another, both fires involved areas accessible "from the street to which [defendant] could have approached," and the burning of single objects found "on scene." In so ruling, the trial court found that the probative value of the evidence was not substantially outweighed by the potential of undue prejudice against defendant under Evidence Code section 352.

Prior to the admission of the evidence concerning the uncharged offense, the trial court instructed the jury as follows: "The People are going to present evidence that the defendant

committed another offense of arson that was not charged in this case. Now, you may consider this evidence only if the People prove by a preponderance of the evidence that the defendant in fact committed the uncharged offense.

"Proof by a preponderance of the evidence is a different burden of proof than beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. If the People have not met this burden, you must disregard this evidence entirely. If you do decide that the defendant committed the uncharged act, you may, but are not required to, consider the evidence for the following limited purpose: that the defendant was the person who committed the offenses charged and alleged in this case.

"In evaluating this evidence, consider the similarity or lack of similarity between the charged offenses and the acts charged in this case.

"Do not consider this evidence, the uncharged act, for any other purpose except for the limited purpose of establishing identity.

"Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.

"If you conclude that the defendant committed the uncharged acts, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of arson. The People must still prove each charge and allegation in this case beyond a reasonable doubt."

Following the presentation of evidence, the trial court repeated this limiting instruction to the jury.

B. *Relevant law*

Evidence that a defendant has committed crimes or acts other than those he is currently charged with is not admissible to

prove the defendant's conduct on a specific occasion. (Evid. Code, § 1101, subd. (a).) However, evidence of uncharged crimes or "other acts" is admissible to prove the identity of the perpetrator of the charged crimes, the existence of a common design or scheme, motive for the commission of the offense, or the intent with which the perpetrator acted in the commission of the charged crimes. (Evid. Code, § 1101, subd. (b); *People v. Kipp* (1998) 18 Cal.4th 349, 369; *People v. Ewoldt* (1994) 7 Cal.4th 380, 393, superseded in part by statute on other grounds as stated in *People v. Robertson* (2012) 208 Cal.App.4th 965, 991.)

In order for uncharged misconduct to be admissible to prove identity, "the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 403; see also *People v. Chism* (2014) 58 Cal.4th 1266, 1306.) In order to support an inference that the same person committed both the uncharged and charged offenses, the proponent of the evidence does not need to establish "one or more unique or nearly unique common features; features of substantial but lesser distinctiveness may yield a distinctive combination when considered together. [Citation.]" (*People v. Miller* (1990) 50 Cal.3d 954, 987.) Although "characteristics common to both the charged and uncharged acts must be distinctive" in order to prove identity, "they may be few in number." (*People v. Erving* (1998) 63 Cal.App.4th 652, 660.)

A trial court may admit evidence under Evidence Code section 1101, subdivision (b), unless to do so would constitute an abuse of discretion under Evidence Code section 352. (*People v. Branch* (2001) 91 Cal.App.4th 274, 280–283.)

We review a trial court's decision to admit evidence of a defendant's prior uncharged offense for abuse of discretion.

(*People v. Memro* (1995) 11 Cal.4th 786, 863.) In conducting that review, we balance the probative nature of the evidence against four factors: (1) the inflammatory nature of the uncharged conduct; (2) the possibility of confusion of issues; (3) remoteness in time of the uncharged conduct; and (4) possible undue consumption of time at trial. (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404–406; *People v. Branch*, *supra*, 91 Cal.App.4th at pp. 282–283; *People v. Harris* (1998) 60 Cal.App.4th 727, 737–741.)

C. *Analysis*

Applying these legal principles, we conclude that the trial court did not abuse its discretion when it admitted evidence of defendant's uncharged act of burning Brignano's Christmas tree in order to establish his identity as the individual who committed the charged arson. The two offenses shared characteristics sufficient to support an inference that the same person committed both offenses. The offenses were committed within a span of three days and in the same general vicinity, which was in the area of defendant's residence. Both incidents involved defendant burning a single object that he encountered outside of a residence, without any apparent use of an accelerant. Based on the proximity of the two events in time and location, and the similarity of the acts of burning items found outside of a residence, the trial court did not abuse its discretion, in admitting the uncharged offense to prove identity. (*People v. Sanchez* (2016) 63 Cal.4th 411, 452–453; *People v. Kipp*, *supra*, 18 Cal.4th at p. 371; *People v. Erving*, *supra*, 63 Cal.App.4th at pp. 659–660.)

Moreover, the trial court did not abuse its discretion under Evidence Code section 352 when it determined that the possibility of undue prejudice to defendant from the admission of the evidence was not outweighed by the probative value of the

evidence. Defendant's uncharged arson of a discarded Christmas tree in an alley was far less inflammatory than the charged offenses in counts 2 and 5 involving the burning of an American flag on the porch of an occupied residence, within a foot of the home's wooden door. (*People v. Branch*, *supra*, 91 Cal.App.4th at p. 283.) The uncharged offense was not remote in time, as it occurred a mere three days prior to the charged offense. (*Id*. at p. 281.) Given the trial court's limiting instructions, there was no possibility of confusion by the jury, and the appellate record does not suggest any confusion on the part of the jury. (*Id.* at p. 284.) Finally, the evidence pertaining to the uncharged offense was presented in a short amount of time at trial. (*Id*. at p. 285.)

Urging reversal, defendant suggests that the admission of the evidence of the uncharged arson violated his federal constitutional right to due process. But it is well-established that the trial court's application of the ordinary rules of evidence do not violate a defendant's right to due process. (See *People v. Lindberg* (2008) 45 Cal.4th 1, 26; *People v. Boyette* (2002) 29 Cal.4th 381, 427–428.)

Even if the trial court had erred by admitting this evidence, which it did not, defendant failed to establish that he suffered any prejudice as a result of the alleged error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Welch* (1999) 20 Cal.4th 701, 749–750.) The trial court instructed the jury that in evaluating this evidence, it had to "consider the similarity or lack of similarity between the charged offense[] and the acts charged in this case." It specifically told the jury that it could not consider this evidence for any purpose other than for identity, and that it could "not conclude from this evidence that the defendant has a bad character or is disposed to commit crime." We presume the jury understood and followed the trial court's instructions. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1337.)

It follows that even if the uncharged arson was dissimilar from the charged offense, the jury would not have relied upon that evidence to conclude that defendant was the individual who committed the charged offense. Instead, following the trial court's instructions, the jury would have relied upon Safar's eyewitness identification of defendant as the individual who set the fire on Jaybrook Drive.

II. The trial court did not err by admitting defendant's Facebook photograph (People's Exhibit Number 14)

Defendant contends that the trial court abused its discretion when it admitted a photograph of Brignano's burning Christmas tree, which Detective Dondis obtained from defendant's Facebook page, into evidence.

A. *Forfeiture*

Preliminarily, we note that defendant failed to pose any objection to the introduction of the photograph, or to Detective Dondis's testimony about it, at trial. It follows that his objection has been forfeited on appeal. (Evid. Code, § 353, subd. (a); *People v. Doolin* (2009) 45 Cal.4th 390, 448; *People v. Bolin* (1998) 18 Cal.4th 297, 321; *People v. Sims* (1993) 5 Cal.4th 405, 448.)

Defendant seems to suggest that a statement in his written, pretrial opposition to the People's motion to admit evidence under Evidence Code section 1101, subdivision (b), preserved this claim for appellate review. His contention lacks merit.

In his opposition, defendant stated: "There is no evidence of when or who took the pictures. There is no indication of when these fires occurred or in what state or county they occurred. There are no police reports regarding the Facebook account [or] the pictures on Facebook. This offered evidence is not admissible." These statements are insufficient to preserve defendant's objection that the photograph was not properly

authenticated by the People's witnesses during trial. (*People v. Williams* (1997) 16 Cal.4th 635, 661–662; *People v. Jackson* (2016) 1 Cal.5th 269, 328 [a proper objection must inform the trial court of the specific reasons the objecting party believes the evidence should be excluded].)

Our conclusion is bolstered by Brignano's testimony, which resolved many of the concerns defendant briefly voiced in his opposition to the People's pretrial motion. Brignano testified at trial that defendant had taken the photograph in question in an alley abutting his residence on December 30, 2013. If defendant believed that this evidence was insufficient to authenticate the photograph, he should have so objected at trial.

Even if defendant's written pretrial opposition constituted a sufficient authentication objection to evidence subsequently admitted at trial, defendant's failure to seek or obtain a ruling on that objection resulted in a forfeiture of the claim on appeal. (*People v. Lewis* (2008) 43 Cal.4th 415, 481 ["Failure to press for a ruling on a motion to exclude evidence forfeits appellate review of the claim because such failure deprives the trial court of the opportunity to correct potential error in the first instance"], rejected on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 919–920.)

B. *The trial court did not err in admitting the photograph*

Setting defendant's procedural obstacle aside, substantively defendant's claim of error fails. The trial court did not abuse its discretion in admitting the photograph into evidence.

1. Relevant law

Authentication of a writing, including a photograph, is required before it may be admitted into evidence. (Evid. Code, §§ 250, 1401.) "Authentication is . . . statutorily defined as 'the introduction of evidence sufficient to sustain a finding that it is

the writing that the proponent of the evidence claims it is' or 'the establishment of such facts by any other means provided by law' ([Evid. Code,] § 1400)." (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266.) "[T]he proof that is necessary to authenticate a photograph or video recording varies with the nature of the evidence that the photograph or video recording is being offered to prove and with the degree of possibility of error. [Citation.]" (*People v. Goldsmith*, *supra*, at p. 267.) "The foundation requires that there be sufficient evidence for a trier of fact to find that the writing is what it purports to be, i.e., that it is genuine for the purpose offered. [Citation.]" (*Ibid.*)

"A photograph or video recording is typically authenticated by showing it is a fair and accurate representation of the scene depicted. [Citations.] This foundation may, but need not be, supplied by the person taking the photograph or by a person who witnessed the event being recorded. [Citations.] It may be supplied by other witness testimony, circumstantial evidence, content and location. [Citations.]" (*People v. Goldsmith, supra*, 59 Cal.4th at pp. 267–268.) There is no restriction on the means by which a writing or photograph may be authenticated. (*People v. Valdez* (2011) 201 Cal.App.4th 1429, 1435.) "'As long as the evidence would support a finding of authenticity, the writing [or photograph] is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility.' [Citation.]" (*People v. Goldsmith, supra*, at p. 267.)

2. Analysis

The challenged evidence is a photograph of Brignano's burning Christmas tree in the alley outside his residence, obtained from defendant's Facebook page. Detective Dondis testified that he obtained the photograph from defendant's Facebook page, which was in the name of "Joe Mack III."

Defendant's middle name is Joseph, and his last name is MacKenzie. Brignano testified that he observed defendant taking the photograph with his cell phone. Brignano even photographed defendant at the time defendant was filming the burning tree, and his photographs were shown to the jury. Detective Dondis testified that the alley depicted in the photograph obtained from defendant's Facebook page was the same alley located outside Brignano's residence. Taken together, the testimony of Brignano and Detective Dondis and the photographs from the alley were sufficient to establish the authenticity of People's Exhibit Number 14. (Evid. Code, § 1400; *People v. Chism*, *supra*, 58 Cal.4th at pp. 1303–1304; *People v. Valdez*, *supra*, 201 Cal.App.4th at p. 1435; *People v. Goldsmith*, *supra*, 59 Cal.4th at pp. 267–268.)

Defendant contends that the photograph was not properly authenticated because: (1) he did not testify that he had taken the photograph and uploaded it to Facebook; (2) no one testified that they saw him upload the photograph to Facebook; (3) no expert testified as to whether the Facebook account belonged to defendant; (4) assuming the Facebook page belonged to defendant, no expert testified regarding other people's access to defendant's Facebook account; and (5) no expert testified that the photograph was not a "composite" or "faked" photograph. These issues go to the weight of the evidence, not its authenticity. (*People v. Valdez*, *supra*, 201 Cal.App.4th at p. 1435.) The author's (or photographer's) testimony is not required to authenticate a document (or photograph). (Evid. Code, § 1411; *People v. Valdez*, *supra*, at p. 1435.) In fact, there are no restrictions on "the means by which a writing may be authenticated." (Evid. Code, § 1410.) Similarly, no expert testimony regarding content obtained from a social media Web site, or photographs taken from such a Web site, is required

before a trial court may determine that the content has been properly authenticated. (*In re K.B.* (2015) 238 Cal.App.4th 989, 996–997; *People v. Valdez*, *supra*, at p. 1436.)

Even if the trial court erred by admitting People's Exhibit Number 14 into evidence, which it did not, defendant suffered no prejudice as a result of the claimed error. There is no reasonable probability that defendant would have received a more favorable outcome at trial had the photograph been excluded. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

As set forth above, Brignano testified that he saw defendant standing in front of the burning tree, filming the tree with his cell phone. Brignano photographed defendant, and the jury saw Brignano's photograph at trial. Brignano also photographed defendant's vehicle, which arson investigators established was registered to one of defendant's family members who resided at his residence. In light of this evidence, there is no reasonable probability that defendant would have obtained a more favorable result at trial had the evidence obtained from defendant's Facebook page been omitted. (*People v. Beckley* (2010) 185 Cal.App.4th 509, 517–518 [error in admitting document obtained from the internet was harmless given other evidence establishing the same facts established by the document].)

Defendant claims that he was prejudiced by the admission of the photograph because it allowed the prosecutor to argue to the jury that defendant destroyed his cell phone because he had arson-related photographs on his phone that would have incriminated him. But the prosecutor could have made this same argument irrespective of the admission of People's Exhibit Number 14 because Brignano testified that he saw defendant filming the burning tree, and photographed him doing so, and Detective Dondis testified that defendant threw his cell phone in

the toilet the moment the detective arrived at defendant's residence. Thus, defendant has not established prejudice.

III. No cumulative error

Defendant argues that his conviction should be reversed as a result of cumulative error. As set forth above, defendant has failed to demonstrate any error. And, even if we agreed that defendant's claims of evidentiary error had merit, the claimed errors were insignificant in light of the overwhelming evidence of defendant's guilt. Thus, we reject defendant's contention of cumulative error. (*People v. Montiel* (1993) 5 Cal.4th 877, 944 [errors do not require a reversal whether considered singly or together as they had a minimal impact on the overall fairness of the defendant's trial], disapproved in part on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) Defendant was not denied a fair trial. (*People v. Homick* (2012) 55 Cal.4th 816, 884.)

IV. Presentence custody credits

We agree with the parties that the abstract of judgment must be modified to reflect one additional day of presentence custody credit.

The trial court found defendant was entitled to 1,160 days of actual custody time. However, the total number of days in between and including the day of defendant's arrest is 1,161 days. (*People v. Bravo* (1990) 219 Cal.App.3d 729, 735 ["a sentencing court must award credits for all days in custody up to and including the day of sentencing"].)

Accordingly, we order the abstract of judgment to be modified to reflect 1,161 days of presentence actual custody time.

V. Diversion hearing (§ 1001.36) and newly authorized discretion to strike (SB 1393)

While this appeal was pending, the Legislature enacted section 1001.36, which took effect June 27, 2018, and authorized

pretrial diversion for defendants with mental disorders. The Legislature also enacted an amendment to section 667, subdivision (a), which took effect January 1, 2019, and gives the trial court discretion to dismiss the punishment for a prior serious felony conviction.

A. *Section 1001.36*

Section 1001.36 authorizes pretrial diversion for defendants with mental disorders. "'[P]retrial diversion' means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment." (§ 1001.36, subd. (c).)

A trial court may grant pretrial diversion under section 1001.36 if the court finds: (1) the defendant suffers from an identified mental disorder; (2) the mental disorder played a significant role in the commission of the charged offense; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and the defendant waives his speedy trial rights; (5) the defendant agrees to comply with the treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety, as defined in section 1170.18, if he is treated in the community. (§ 1001.36, subd. (b).)

If the trial court grants pretrial diversion, "[t]he defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources" for "no longer than two years." (§ 1001.36, subds. (c)(1)(B) & (c)(3).) If the defendant performs "satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion." (§ 1001.36, subd. (e).)

Defendant asserts that these statutes apply retroactively to this case because the statutes have an ameliorative effect on punishment. The People contend that the new statutes do not apply retroactively because the Legislature did not intend them to apply retroactively. We agree with defendant.

As a canon of statutory interpretation, we generally presume laws apply prospectively rather than retroactively. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 307 (*Lara*).) However, the Legislature may explicitly or implicitly enact laws that apply retroactively. (*Ibid.*) To determine whether a law applies retroactively, we must determine the Legislature's intent. (*Ibid.*)

"'When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final.'" (*Lara, supra*, 4 Cal.5th at p. 307, quoting *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*).) "'The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.' [Citations.]" (*Lara*, at p. 308.)

The *Estrada* rule applies to section 1001.36 because section 1001.36 lessens punishment by giving defendants the possibility

of diversion and then dismissal of criminal charges. (*People v. Frahs* (2018) 27 Cal.App.5th 784, 791 (*Frahs*).) In addition, applying section 1001.36 retroactively is consistent with the statute's purpose, which is to promote "[i]ncreased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety." (§ 1001.35, subd. (a).)

The statute's definition of pretrial diversion, which indicates the statute applies at any point in a prosecution from accusation to adjudication (§ 1001.36, subd. (c)), does not compel a different conclusion. "The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate. Indeed, the fact that a juvenile transfer hearing under Proposition 57 ordinarily occurs prior to the attachment of jeopardy, did not prevent the Supreme Court in *Lara*, *supra*, 4 Cal.5th 299, from finding that such a hearing must be made available to all defendants whose convictions are not yet final on appeal." (*Frahs*, *supra*, 27 Cal.App.5th at p. 791.)

Furthermore, the California Supreme Court decided *Lara* before the Legislature passed section 1001.36 and the Legislature is deemed to have been aware of the decision. (See *People v. Overstreet* (1986) 42 Cal.3d 891, 897.) Had the Legislature intended for the courts to treat section 1001.36 in a different manner, we would expect the Legislature to have expressed this intent clearly, not subtly. (See *In re Pedro T.* (1994) 8 Cal.4th 1041, 1049 [to counter the *Estrada* rule, the Legislature must "demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it"].) Consequently, we conclude section 1001.36 applies retroactively to this case.

B. *SB 1393*

While this case was pending on appeal, the Legislature also enacted an amendment to section 667, subdivision (a), which took effect on January 1, 2019, and will give the trial court the discretion to dismiss the punishment for a prior serious felony conviction. The People contend that we need not remand the case for resentencing "because the trial court's discretionary choices at sentencing clearly indicated that it would not have dismissed the enhancements in any event."

When, as here, a court is unaware it had the discretion to reduce a sentence, "[r]emand is required unless the record reveals a clear indication that the [court] would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.]" (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110.)

Here, it is not clear that the trial court would have stricken the prior serious felony enhancement had it known it had the discretion to do so. In urging us to reject defendant's argument, the People note that the trial court partially granted defendant's *Romero*[3] motion, striking two of his three prior strikes in the furtherance of justice. But, the reporter's transcript indicates that the trial court did so because "the conduct in this case and the fact that the underlying strikes ar[o]se out of a single incident in a single course of conduct t[ook] [defendant] outside of the spirits of the Three Strikes law." Those comments do not indicate that the trial court exercised the sort of discretion envisioned under section 667, subdivision (a). The trial court did not, for example, consider factors in aggravation and mitigation. (See, e.g., *People v. McVey* (2018) 24 Cal.App.5th 405, 418.) Under these circumstances, remand is appropriate.

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[3] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

DISPOSITION

The judgment is conditionally reversed. The cause is remanded to the trial court with directions to conduct a diversion eligibility hearing under section 1001.36. If the court determines that defendant qualifies for diversion under section 1001.36, then it may grant diversion. If defendant successfully completes diversion, then the court shall dismiss the charges.

However, if the trial court determines that defendant is ineligible for diversion, or defendant does not successfully complete diversion, then the court shall reinstate his convictions. The court shall also conduct a new sentencing hearing to consider whether to exercise its newly authorized discretion under amended section 667, subdivision (a), to dismiss the punishment for the prior serious felony conviction.

In addition, the trial court shall modify the abstract of judgment to reflect 1,161 days of actual custody credits and then forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT